

TRANSCRIPT OF PROCEEDINGS

In Re: MUR 5440,
The Media Fund

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

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BEFORE THE
FEDERAL ELECTION COMMISSION

In Re: MUR 5440,
The Media Fund

Probable Cause Hearing

United States
Federal Election Commission
999 E Street, Northwest
Washington, D.C.

Wednesday, March 21, 2007

MEMBERS OF THE PANEL:

- DAVID M. MASON, VICE CHAIRMAN
- STEVEN T. WALTHER, COMMISSIONER
- ELLEN L. WEINTRAUB, COMMISSIONER
- HANS A. von SPAKOVSKY, COMMISSIONER

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

2 - - - - -

3 VICE CHAIRMAN MASON: This executive
4 session of the Federal Election Commission of March
5 21st, I believe it is, 2007 will come to order. This
6 is a session to provide a probable cause hearing for
7 The Media Fund. It is the first probable cause
8 hearing the Commission has held, and we appreciate
9 Respondents and Respondents' counsel giving us this
10 opportunity. I'm sure they're happy to be here too.

11 We have at the table myself, as vice
12 chairman and conducting the hearing, because chairman
13 Lenhard is recused in this matter, Commissioner von
14 Spakovsky, Commissioner Walther, and Commissioner
15 Weintraub, our staff director, deputy staff director,
16 Margarita Maisonet, our general counsel, accompanied
17 by Mark Shonkwiler, and at the table the attorney is?

18 MS. TRAN: Lynn Tran.

19 VICE CHAIRMAN MASON: Lynn Tran, other
20 members of the general counsel's staff are in
21 the room and other members of the
22 Commissioners' staff, Respondents are being
23 represented by Lyn Utrecht and Eric Kleinfeld,
24 accompanied by Sarah Chambers and Harold Ickes,
25 first president of The Media Fund, and Erik

1 Smith, the current president of The Media Fund
2 are also present in the room.

3 Procedures, as we have explained to
4 the counsel, is that counsel will have 20
5 minutes to make a presentation. Counsel has
6 indicated that she would like to take 15
7 minutes for an opening statement, five minutes
8 to close. Following that, commissioners, the
9 staff director, and the general counsel will
10 ask questions for a period of about an hour to
11 an hour and 10 minutes.

12 We will not be using the light system
13 because we are not going to apportion time
14 among commissioners and members of the staff
15 who are going to be asking questions. However,
16 I will exercise the gavel if I find it
17 necessary to conduct -- direct the discussions
18 or to allow an early discussion.

19 The procedures also require the
20 chairman to outline a statement of the case,
21 which I will try to do briefly. The general
22 counsel's brief sets forth the case, The Media
23 Fund is a political committee by virtue of
24 meeting Federal Election Campaigns Act
25 statutory contribution and expenditure tests.

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1 The brief cites solicitations by The Media Fund
2 officials and The Media Fund's joint
3 fundraising solicitations through the joint
4 victory committee as support for its conclusion
5 that The Media Fund raised in excess of the
6 statutory \$1,000 threshold in contributions.

7 The general counsel's brief cites six
8 communications by The Media Fund which the
9 brief analyzes as constituting express advocacy
10 and, therefore, expenditures, pursuant to the
11 Commission's regulations of 11 CFR 100.22(a)
12 and (b). The cost for those ads were well in
13 excess of the statutory \$1,000 expenditure
14 threshold.

15 Having concluded that The Media Fund
16 met the statutory contribution and expenditure
17 test for political committee status, the
18 general counsel's brief analyzes The Media
19 Fund's major purpose and concludes that its
20 major purpose was federal campaign activity.
21 Granting these conclusions, The Media Fund was
22 required to register as a political committee
23 with the Commission, disclose its receipts of
24 disbursements and comply with the Federal
25 Election Campaign Act's contribution limits and

1 source prohibitions.

2 The Media Fund's response contests
3 each of these points. The response brief
4 argues that the general counsel's solicitation
5 analysis constitutes an impermissible
6 retroactive application of the Commission's new
7 solicitation regulation at 11 CFR 100.57 and
8 that the Survival Education Fund case cited for
9 the solicitation analysis is inapposite and, in
10 any case, wrongly applied to the facts of The
11 Media Fund's activities and that fundraising
12 solicitations through the joint victory
13 committee were approved by the Commission's own
14 regulations and that, therefore, the brief does
15 not support the conclusion that The Media Fund
16 received contributions.

17 The response brief argues that the
18 cited communications do not constitute express
19 advocacy under either 100.22(a) or (b) and
20 argues that 100.22(b) is, in any case, an
21 invalid response. The brief cites previous
22 Commission conclusions and argues that the
23 Commission has never found express advocacy in
24 the absence -- excuse me, of references to
25 candidacy elections or voting and argues that

1 The Media Fund's communications lack any such
2 references, concluding, therefore, that the
3 general counsel's brief fails to support the
4 conclusion that The Media Fund made
5 expenditures as defined by FICA and the
6 Commission's regulations.

7 The response brief argues finally that
8 the major purpose analysis is misplaced and
9 misapplied to Media Fund. Ms. Utrecht?

10 MS. UTRECHT: Thank you, Mr. Chairman,
11 and we thank the Commission for this
12 opportunity to appear today. When we
13 originally requested the hearing, we didn't
14 contemplate that we would be the first ones to
15 be here, and so we hope that at the conclusion,
16 when we leave, we don't feel like we are lab
17 rats escaping from an experiment gone awry.

18 We also would like to thank the
19 general counsel's office. They have,
20 throughout this entire investigation, behaved
21 as they usually do, in a very professional
22 manner, and we appreciate the efforts that they
23 made to accommodate our needs and concerns
24 during the discovery period.

25 The Media Fund was set up with the

1 express purpose of making communications that
2 would not be expenditures under FICA, but that
3 would be electioneering communications, if they
4 were made during the electioneering time
5 periods. Under the law applicable in 2004, we
6 believe it was clear that Congress, the Courts,
7 and this Commission recognized that it would be
8 permissible to set up 527 organizations for
9 this purpose.

10 In the words of this Commission in its
11 brief to the Supreme Court in McConnell,
12 "527s," may and I quote, "target a particular
13 candidate." And in the words of the sponsors
14 of BCRA to the Supreme Court, "Electioneering
15 communications are unambiguously related to the
16 election of a particular candidate."

17 The Supreme Court itself in McConnell
18 recognized that 527s, after BCRA, would be
19 allowed to continue to raise soft money, to pay
20 for a whole variety of activities, including
21 voter registration, GOTV activities, mailings
22 and broadcast advertisings, subject to the
23 electioneering communication reporting
24 requirements and limitations on sources of
25 funds. This is what The Media Fund did.

1 It did not accept contributions, and
2 it did not make expenditures within the meaning
3 of the act. We requested this hearing because
4 we are challenging the conclusions that the
5 chairman has outlined in the general counsel's
6 brief. First, The Media Fund disputes the
7 assertion that it was the law in 2004 that the
8 content or words of a solicitation determine
9 whether the money that was raised was hard
10 money or soft money.

11 Clearly, the Commission's new
12 regulation, 100.57, was not the law in 2004.
13 Thus, the general counsel's only support for
14 this solicitation argument is the 1995 Survival
15 Education Fund case. We think that Survival
16 Education Fund does not provide support for the
17 general counsel's position. At its core,
18 Survival Education Fund was a disclaimer case,
19 it was not a fundraising case.

20 Survival Education Fund has never been
21 cited by a court for the proposition for which
22 it's cited by the general counsel, and in fact,
23 it was not cited by the Commission in any
24 matter until late 2004, in documents that were
25 not made public until the end of 2005 and early

1 2006, well after the '04 election cycle. Even
2 today, if you searched the Commission's
3 enforcement matter database for Survival
4 Education Fund, you will not find any documents
5 that were placed on the public record before
6 November '05 that cite Survival Education Fund
7 for the proposition that the words of the
8 solicitation determine what kind of money is
9 raised.

10 Between 1995, when the case was
11 decided, and late 2005, a 10-year period, there
12 was no way for anyone in the regulated
13 community to know that the Commission would
14 interpret Survival Education Fund in this
15 matter in an enforcement matter. No advisory
16 opinion was cited for this proposition either.

17 We also disagree that Survival
18 Education Fund says what the general counsel's
19 brief says it does. In fact, the Court, in
20 Survival Education, affirmed that not all
21 fundraising activity mentioning federal
22 candidates converts funds received into federal
23 contributions.

24 Instead, the Court said that the only
25 funds that are converted to express advocacy

1 communication, yeah, express advocacy
2 expenditures are the ones that are considered
3 hard money contributions. The Court in
4 Survival Education Fund also explicitly
5 acknowledged that advocacy groups may both
6 applaud and criticize federal candidates and
7 that the funds that they raised to do so, even
8 in an election year, are not contributions.

9 Thus, we urge the Commission to
10 re-examine Survival Education Fund and reject
11 the conclusion that it supports the general
12 counsel's position. Once Survival Education
13 Fund is rejected as a precedent, there is no
14 support for the general counsel's position on
15 this issue.

16 Second, The Media Fund challenges the
17 expansive and, we believe, incorrect
18 interpretation of express advocacy. The
19 analysis followed by the general counsel in
20 this case essentially would write the
21 electioneering communication provisions out of
22 the law because virtually any communication
23 that would be an electioneering communication
24 would turn the communicator into a political
25 committee.

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1 In fact, it is, today even, still
2 difficult, perhaps even more difficult to
3 determine what the Commission believes is
4 express advocacy. The general counsel's brief
5 does not provide a clear definition of express
6 advocacy, rather it identifies the six
7 communications and, in some instances, alleges
8 that they are express advocacy simply because
9 they are like another communication that had
10 completely different words in which the
11 Commission found express advocacy.

12 Insofar as express advocacy is a
13 concept that could turn a communicator into a
14 political committee, we believe that the
15 Commission must provide clear advanced guidance
16 to the regulated community as to what
17 communications would do that, we do not believe
18 that a test that allows a subjective view of
19 each communication is one that will withstand
20 constitutional scrutiny, nor is it fair to
21 change the rules on what is express advocacy.

22 In our response, we have laid out
23 reasons why the general counsel's office is
24 wrong with respect to the two communications
25 they allege are express advocacy under

1 100.22(a), but the general counsel's brief also
2 relies on 100.22 (b) and the Furgatch case,
3 both of which have been discredited and neither
4 of which, in our view, was resurrected by the
5 McConnell decision.

6 The McConnell court never cited
7 100.22(b), and the general counsel's office has
8 written in another matter that McConnell sheds
9 no light on express advocacy beyond Buckley,
10 further, regarding the viability of Furgatch,
11 the Supreme Court in McConnell, which adopted
12 the reasoning of Judge Kohler Catelli's opinion
13 in which she specifically referred to Furgatch
14 as discredited.

15 In McConnell, the Court said that a
16 statute that is neither vague nor overbroad
17 need not meet the express advocacy test, but we
18 submit that that is not true either of
19 100.22(b) or of Furgatch.

20 The one reference in the general
21 counsel's brief that approaches a definition of
22 express advocacy is on page 20, in which the
23 brief says that a communication is express
24 advocacy because, "it relates to the upcoming
25 election by identifying competing candidates,

1 praising Kerry while criticizing Bush." In
2 fact, the ad does not identify those
3 candidates, but that is a characterization of
4 the ad by the general counsel's office.

5 This type of communication is
6 precisely what Congress, the Supreme Court, and
7 this Commission represented to the McConnell
8 court would be an electioneering communication,
9 if run within the 30/60-day time periods. This
10 is exactly what the electioneering
11 communication provisions were intended to
12 capture requiring only reporting and
13 prohibiting the use of corporate and labor
14 money to fund these communications.

15 To accept the counsel's recommendation
16 is to essentially write the electioneering
17 communication provision out of the law, who
18 would be left to make them. In fact, Congress
19 is now considering proposals that would require
20 527s that make electioneering communications to
21 become federal political committees. If
22 legislation is necessary to achieve that
23 result, then that clearly is not the law at
24 this time.

25 We urge the Commission to reject the

1 general counsel's office proposed definition of
2 express advocacy in this case. In public
3 statements this year, the Commission has, on
4 several occasions, expressed the view that its
5 recent disposition of compliance actions from
6 the '04 cycle will give notice to the regulated
7 community as to what the law will be in '08.

8 We applaud the effort to do that, but
9 question whether the enforcement process is the
10 right vehicle for doing so. Nonetheless, we
11 suggest that The Media Fund followed precisely
12 the available Commission guidance on the law in
13 '04. As laid out on pages 20 and 21 of our
14 brief, The Media Fund in fact analyzed the
15 Commission's closed MURs and followed guidance
16 that could be gleaned from them.

17 In those cases, without magic words,
18 but with a reference to a federal candidate,
19 the Commission only found express advocacy up
20 to the year 2004, where there was an
21 identification of an individual as a candidate,
22 a reference to voting, or a reference to an
23 election.

24 None of The Media Fund ads that
25 mentioned a federal candidate included any of

1 those words. While some groups have chosen to
2 settle cases arising out of the '04 cycle, even
3 though they disagree with the Commission's view
4 of what the law was, all of those settlements,
5 all of which expressly dispute the Commission's
6 interpretation, do not provide legal guidance
7 as to what the law was in '04, or notice to the
8 regulated community as to what the Commission
9 had said in '04.

10 That was out there to be gleaned if
11 you were looking to determine when the
12 Commission would find express advocacy.
13 Finally, we also requested this hearing to
14 raise an issue about the potential unfairness
15 of the Commission's relatively new, early
16 settlement policy.

17 While we understand the Commission's
18 desire to encourage early settlement of cases,
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25 Very often, the analysis of the

1 general counsel's office after an investigation
2 is very different than the original allegations
3 and analysis in the complaint that is filed
4 under these circumstances, it is only after
5 receipt of the probable cause brief that the
6 Respondents have an opportunity to address
7 these issues.

8 It is fundamentally unfair to penalize
9 Respondents for trying to make sure that the
10 Commission understands what their arguments are
11 in defense of their actions raised in a
12 complaint. In fact, this case is a perfect
13 example of the dilemma that faces a Respondent.

14 VICE CHAIRMAN MASON: Was this point
15 made in your brief?

16 MS. UTRECHT: No, it was not.

17 VICE CHAIRMAN MASON: I would,
18 conceding the validity of the point, I would
19 ask you to restrict your discussion to the
20 counsel's brief and to your response brief.

21 MS. UTRECHT: Okay. That's fine.
22 Well, in conclusion, we suggest that the
23 Commission should answer the following
24 questions as it considers the general counsel's
25 probable cause recommendation: What was

1 available to the regulated community in 2003
2 and 2004? What notice was there that the
3 Commission believed that the content of a
4 solicitation determined the type of money that
5 was raised? And finally, what notice was there
6 that 100.22(b) and Furgatch were resurrected in
7 the McConnell decision?

8 We submit that there was none, and
9 under these circumstances, we believe that it
10 is fundamentally unfair to apply these
11 principles to The Media Fund. Thank you for
12 the opportunity to be here today, and we'll be
13 happy to answer any questions that you have.

14 VICE CHAIRMAN MASON: Thank you. I
15 want to start off with just one question and
16 clarify, which I think you've answered
17 essentially by the degree of attention, and
18 that is, you did address in the brief the major
19 purpose, analysis, and understanding that you
20 contest the expenditure and contribution
21 analysis.

22 I want to make clear, however, that if
23 you saw a case where you conceded that the
24 expenditure and contribution tests were met,
25 that at that point, the major purpose analysis

1 would be appropriate.

2 MS. UTRECHT: Yes. However, we
3 believe that the major purpose analysis that
4 would be applicable to The Media Fund, you
5 would have to look at the types of
6 communications that the Media Fund made, and
7 for that, you would look at whatever the
8 express advocacy communications were to
9 determine whether that was the major purpose of
10 the organization. We think there's support for
11 that in the MCFL case and also in GOPAC.

12 In the GOPAC case, the Court concluded
13 that you would look at the direct candidate
14 support expenditures, not the indirect support
15 expenditures, and in MCFL, we believe the Court
16 said you would look at the independent
17 expenditures, not the other expenditures of the
18 organization.

19 VICE CHAIRMAN MASON: So that if I can
20 restate it, your position is that, potentially,
21 we would have to look at the ratio of express
22 advocacy expenditures to other expenditures in
23 that analysis?

24 MS. UTRECHT: Yes.

25 VICE CHAIRMAN MASON: The other

1 Commissioners are not prepared. I'll go ahead.
2 One of the things I note is you have proffered,
3 in essence, an alternative definition for
4 express advocacy, which I certainly appreciate,
5 but I'm a little curious about what it is
6 derived from, and that is the indication about
7 the status of a candidate as a candidate in
8 reference to elections or voting.

9 And I note that you cite a number of
10 previous MURs. However, how one would
11 characterize those MURs? In other words, how
12 you derive that particular test out of those
13 MURs isn't quite clear to me. And, for
14 instance, in at least one of the cases where
15 the Commission did not find express advocacy,
16 there was clearly a reference to candidacy and
17 that is the Hagel matter, where it said
18 something about him coming to Nebraska to run
19 for Senate.

20 And so those kind of exclusionary
21 tests are sometimes difficult to apply, as I
22 think you understand. Furthermore, if we take
23 kind of a black letter express advocacy, such
24 as support Joe Green, which doesn't get a lot
25 of attention before the Commission, mostly

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1 because it's not contested, in other words,
2 somebody will concede that or simply not do it,
3 there's no reference to the candidate as a
4 candidate, one has to gather that from the
5 context.

6 And unless you conclude that the word
7 "support" is an implied reference to voting and
8 elections, which it clearly would be, but it's
9 an express advocacy test that doesn't meet it.
10 And I have seen this voting elections and
11 candidates iteration in one other place, and
12 that was in internal matters from the 1996
13 election cycle.

14 But I'm curious as to whether there's
15 any other precedent of the Commission or a
16 court or anywhere elsewhere you can derive that
17 test or if it's solely from your statement,
18 based on your analysis of the Commission's past
19 holdings.

20 MS. UTRECHT: Well, Commissioner, what
21 we tried to do was look -- well, first, we
22 believe that the correct test is express
23 advocacy, the magic word's "test," but we
24 recognized that the Commission, in various
25 enforcement actions over the course of many

1 years, has found express advocacy either under
2 100.22(b) or under Furgatch or under a test
3 that may not have been specifically
4 articulated, but the Commission has found other
5 formulations of ads to contain express
6 advocacy.

7 We aren't really trying to advance a
8 new definition of what express advocacy is. We
9 were trying, in formulating what kind of rules
10 the Media Fund would follow, we were trying to
11 look at where the Commission had in fact found
12 express advocacy and try to derive from that
13 what we think were the least common
14 denominators.

15 So, for example, I agree that if you
16 say, "support John Smith, "that that doesn't
17 say candidate election or voting, but we
18 believe that is express advocacy. It's only
19 when we're looking beyond the magic words at a
20 particular communication, trying to derive some
21 kind of principles that we could use in order
22 to advise as to what the Commission has in the
23 past found to be express advocacy.

24 VICE CHAIRMAN MASON: Ms. Weintraub.

25 COMMISSIONER WEINTRAUB: Thank you,

1 and thank you, Lynn, for coming in. I hope, at
2 the end of the day, you will not feel like a
3 lab rat, but rather like a trailblazer. I
4 think it's very useful for us to have the
5 opportunity to actually see you face-to-face
6 and hear what you have to say in person. I
7 wanted to also probe a little bit about your
8 views on express advocacy.

9 I gather, from what you just said,
10 that you think there is some category of
11 communications beyond strict magic words that
12 would fall under the category of express
13 advocacy?

14 MS. UTRECHT: Actually, we don't
15 believe that as a matter of law. We believe
16 that the correct test is express advocacy,
17 but --

18 COMMISSIONER WEINTRAUB: We all think
19 the correct test is express advocacy. The
20 question is whether we --

21 MS. UTRECHT: But the magic words were
22 express advocacy, and what we were trying to
23 do, recognizing that the Commission had gone
24 beyond the magic words in a variety of cases,
25 tried to figure out what the common threads

1 were in those cases.

2 COMMISSIONER WEINTRAUB: Do you think
3 that it is fair to assume any information that
4 is not in the ad? I mean, you talked about the
5 general counsel's characterization of Kerry and
6 Bush as candidates. Do you think it's
7 illegitimate for us to assume that when people
8 look at an ad, they understand that Kerry and
9 Bush are running for president against each
10 other because people generally know that in the
11 country?

12 MS. UTRECHT: Well, we think that the
13 Commission has to look only at the four corners
14 of the ad and not assume other facts, so, yes.
15 And I think that's also one of the principles
16 that the Wisconsin right to life case makes.

17 COMMISSIONER WEINTRAUB: On appeal.
18 Do you think that the ad has to have some --
19 even if you look just at the four corners of
20 the ad, does it have to have some ostensible
21 purpose beyond advocating the election of one
22 of these two candidates? I mean, in the old
23 days, there used to be, you know, these tag
24 lines of, "call Joe Schmoe," at the end of the
25 ad and tell him to support family values or

1 stop beating his wife or be nicer to kittens
2 and puppies, whatever they put on at the end,
3 and many other ads that had very legitimate
4 things that they wanted people to do.

5 But that was sort of the hook. You
6 could look at that and say, okay, this isn't an
7 ad for the purpose of influencing election,
8 this is an ad for the purpose of getting people
9 to do something, to call somebody, to advocate
10 for some other position. The tag lines have
11 sort of dropped off on a lot of these ads, so
12 is there something that you have to be able to
13 see in the ad that would explain what it's for,
14 other than for the purpose of influencing an
15 election?

16 MS. UTRECHT: No, because I think the
17 cases, as we read them, require that in order
18 for there to be express advocacy, there
19 actually has to be an exhortation to take
20 action that would be electoral action. That's
21 what we think the cases, particularly in the
22 D.C. circuit, in district court here, have
23 said.

24 So in that sense, I think that there
25 is not the need to tack on some other

1 exhortation at the end of an ad, and in fact, I
2 think one of the reasons why the Commission has
3 seen those tag lines drop off over the last 10
4 years or so is because that's what everybody
5 believed was the law, that you didn't look to
6 see whether there was an exhortation to do
7 something else, you looked to see whether there
8 was an exhortation to take action related to
9 the election.

10 COMMISSIONER WEINTRAUB: And I want to
11 say that I do think a lot of the points in your
12 brief are very well-taken. I appreciate the
13 analysis of all the communications that you
14 went through. Some of them are harder for me
15 than others.

16 When I look at the American dream, the
17 ad that starts off, "John Kerry wants every kid
18 to be able to afford a college education and
19 live the American dream," and it includes
20 language, "We need a president who encourages
21 pursuit of the American dream, instead of
22 dashing these hopes."

23 And then it goes on, "John Kerry,
24 making the American dream a reality." This is
25 at appendix (b) of your submission, and it is

1 one of the ads that counsel isolated.

2 MS. UTRECHT: Was that one of the --

3 COMMISSIONER WEINTRAUB: Appendix (b),
4 the one about the tuition cross and Santiago.

5 COMMISSIONER von SPAKOVSKY: It's page
6 16 of the general counsel's brief.

7 MS. UTRECHT: Thank you. Well, this
8 ad, I think, in our view, when we looked at
9 this, there was specifically a MUR that dealt
10 with Senator Hagel that said he thinks he can
11 just walk in and run for senator from Nebraska,
12 so we did not, and there was later another one
13 that related to the Brady campaign to prevent
14 gun violence, where the tag line was, "Should
15 the next president be a candidate of the gun
16 lobby? "

17 So in looking at these communications,
18 it seemed to us that the mere mention of a
19 president or needing a president was not
20 express advocacy based on the way the
21 Commission had applied the law in these other
22 cases.

23 COMMISSIONER WEINTRAUB: And you don't
24 think that there needs to be any justification,
25 other than the absence of the exhortation to

1 vote for a particular candidate?

2 MS. UTRECHT: It's about an issue.
3 This ad dealt with making college affordable
4 for every American. There were specific
5 proposals in here that were about the issues
6 that John Kerry had raised in the election. We
7 also think, again, that this is different -- I
8 mean, the general counsel's office compared
9 this to an ad that said, "Vote Pro Choice,"
10 which, you know, in my mind, that's express
11 advocacy, and there is no vote here.

12 There's no reference to the date of
13 the election. There's no exhortation to go
14 vote for him or do anything related to this ad.
15 We also think it is distinguishable from the
16 mailer in the Cain MUR that is also cited by
17 the general counsel's office. First of all,
18 that wasn't even made public until after all
19 this activity occurred.

20 But even in that, you have reference
21 to running for Congress, and you had a picture
22 that showed a bumper sticker, sticker of some
23 kind that said, "Tom Caine for Congress," with
24 "never" next to it. So I think the support
25 that the general counsel's office has for this

1 particular mailer, we don't think actually
2 supports the conclusion that it was express
3 advocacy.

4 COMMISSIONER WEINTRAUB: So even using
5 the candidate voting or election references,
6 wording, saying we need a president, is not
7 reference to a candidate?

8 MS. UTRECHT: Certainly, based on what
9 the Commission has done in prior matters.

10 COMMISSIONER WEINTRAUB: Now, you went
11 through a number of our former MURs in your
12 brief and obviously didn't address some of the
13 most recent developments because they came out
14 after you wrote your brief, but given what you
15 obviously know about what the Commission has
16 done recently in the area of 527s and political
17 committee status, can you distinguish your
18 situation from the other cases that have been
19 announced recently?

20 MS. UTRECHT: I don't have before me
21 all of the different ads that those
22 organizations ran. I do think that, in looking
23 at those, it was clear that the Respondents
24 disagreed with the Commission's interpretation
25 of express advocacy as applied to their ads. I

1 also think that, in public statements, various
2 Commissioners, including Chairman Lenhard, have
3 acknowledged that the rules applied with
4 respect to those communications by the
5 Commission were based on the revival of, in his
6 words, "long dormant 1.22(b) and Furgatch."

7 I think that to try to use as
8 precedent settlements that people reach with
9 the Commission while they were vigorously
10 disputing the Commission's position, but chose
11 to settle, rather than to prolong a fight over
12 it, is really not a good way of establishing
13 precedent for what is express advocacy or
14 notice for the regulated community in the
15 future.

16 VICE CHAIRMAN MASON: Commissioner von
17 Spakovsky?

18 COMMISSIONER von SPAKOVSKY: I want to
19 follow up on this ad, if I may, because
20 Commissioner Weintraub and I both, I think,
21 kind of zeroed in on this, and first of all,
22 let me say, you said earlier, if I could
23 paraphrase that, looking at the Survival
24 Education Fund cases, the Courts, you know, the
25 Courts have made clear that groups can

1 criticize candidates in an election year over
2 issues, and I certainly agree with that.

3 I actually tried to get an exemption
4 for electioneering communications because I
5 think that's something that needs to be done,
6 but I really -- it just defies common sense to
7 me, and I just can't understand how, if you do
8 a mailer and an ad that says, "We need a
9 president who encourages pursuit of the
10 American dream," and you're putting that line
11 in when you've just talked about in fact a
12 candidate for president's plan, how that is not
13 express advocacy.

14 I mean, forget part (b), but under
15 part (a), how is that not express advocacy? I
16 think you also said or agreed with vice
17 chairman that if you say, "Support John Smith,"
18 that's going to be express advocacy under the
19 old test, not even worrying about provision
20 (b).

21 I just don't see a difference between
22 saying, you know, "Support John Smith," and
23 saying, "We need a president like this." This
24 is not an issue ad where you're saying, "John
25 Kerry has a great plan for college," and you

1 want people to call him to get him to sponsor a
2 bill in the Senate, which is where he was.
3 You're talking then about saying we need a
4 president who does this, obviously a clear
5 reference to the election, so I just don't
6 quite understand how you're differentiating
7 between this and "Support John Smith."

8 MS. UTRECHT: The difference is
9 because support is an exhortation to take a
10 particular action. "We need a president" is
11 not an exhortation to take an action, and
12 that's what we believe is the standard for
13 express advocacy, even under the cases that we
14 think are going beyond the magic words, they
15 all require that there be a directive to take
16 action in order for there to be express
17 advocacy, and that's what we view as the
18 distinction here.

19 And also, this mailer, we do believe
20 that this mailer in particular had content that
21 was related to issues that are important for
22 people to understand.

23 VICE CHAIRMAN MASON: I wanted to
24 follow up on the precedent issue that you
25 raised because you've gone through in brief and

1 cited a number of past Commission MURs and
2 settlements for guidance, and I think that's
3 entirely fair, but in responding to
4 Commissioner Weintraub, you said that the
5 recent settlements were, I believe I'm quoting
6 you, "not a good way to establish precedent or
7 provide notice."

8 And I have to say to you, which is it?
9 Because while I understand that the Respondents
10 in some of those MURs were disputing that, then
11 the response is, well, then we have to go to
12 litigation, and that was something that we have
13 occasionally discussed here, but I just note
14 that you're leaving the Commission, not to
15 mention Respondents, with a very unattractive
16 choice, if on one hand we say that the
17 Commission's MURs are not appropriately citable
18 and don't give guidance, you know, if there's a
19 disputed resolution.

20 Actually, if you want to respond, go
21 ahead, but I just note that -- if you want to,
22 I have another question to go on.

23 MS. UTRECHT: If you don't mind,
24 Commissioner? I think, first of all, those
25 settlements can't have given notice to the

1 Media Fund because they were many years later.
2 Generally speaking, over many years, the
3 Commission was very leery of using compliance
4 actions as precedent, particularly because the
5 statute requires that any new rule of law be
6 stated in a regulation.

7 So I agree with you that there is a
8 difficulty here that, in the absence of clear
9 rules that give notice to the regulated
10 community as to what the Commission is or is
11 not going to treat as express advocacy,
12 particularly when you have a period of time
13 where, for many years, the Commission did not
14 actively seek to enforce 100.22(b) or use the
15 Furgatch test, that what we are left with is
16 the only choice being to look at what the
17 Commission did in compliance actions and try to
18 figure out how we can derive some principles
19 from those actions.

20 VICE CHAIRMAN MASON: And I'm
21 sympathetic on the 100.22(b) point, but what is
22 the Commission to do? That regulation is on
23 the books. Is it your position that we should
24 ignore that regulation?

25 MS. UTRECHT: I actually believe that

1 the Commission should have removed it from the
2 regulations after the Court cases.

3 VICE CHAIRMAN MASON: But given that
4 it's on the books, what are we to do?

5 MS. UTRECHT: I think that the pattern
6 and practice of the Commission has been to
7 ignore it in the past.

8 VICE CHAIRMAN MASON: I want to
9 explore a little bit more the four corners
10 issue, and I'll give you a hypothetical I've
11 used before, which takes back to 1998 and
12 imagine an ad in the Atlanta Journal a week
13 before the election that says, "Boot Newt, "and
14 we actually had a MUR on the "Boot Newt"
15 campaign.

16 I don't think anyone would contest
17 that that constituted express advocacy, even
18 though "boot" isn't one of the words in the
19 famous footnote 57. Take us to a week after
20 the election, when Gingrich's Speakership was
21 hanging in the balance -- of course, he
22 ultimately resigned from the House -- put an ad
23 in Roll Call that says "Boot Newt."

24 I don't think anyone would argue that
25 that was not express advocacy, that that

1 related to Gingrich's re-election as speaker.
2 I draw from that, that there are points of
3 context related to timing and targeting that
4 can inform our determination about express
5 advocacy, and the issues in Wisconsin right to
6 life were actually quite different from that.

7 So I want to understand that your
8 position really is that the Commission may not
9 regard timing or placement in terms of a
10 geographical area or something of that nature
11 in determining express advocacy.

12 MS. UTRECHT: Well, I think the
13 difference there is that he was not a
14 candidate. I mean, if you -- you only get into
15 express advocacy if you have somebody who is a
16 candidate for election. And so I think that
17 that's a very different situation.

18 VICE CHAIRMAN MASON: But is your
19 position that the Commission may not consider
20 the timing or targeting of the communication in
21 determining whether or not there's express
22 advocacy?

23 MS. UTRECHT: If you have an
24 individual who is a clearly identified federal
25 candidate, which is the first part of whether

1 there is express advocacy, then I think the
2 Commission looks at the words. If there is not
3 a person in an ad who is a clearly identified
4 federal candidate, then I don't think you even
5 get to the question of what the language is.

6 VICE CHAIRMAN MASON: Were Mr. Kerry
7 and Mr. Bush not federal candidates at the time
8 of the Media Fund's communication?

9 MS. UTRECHT: And that's why you then
10 look -- we're not disputing that you look to
11 see whether there was express advocacy because
12 these communications reference depicted a
13 clearly identified federal candidate, but once
14 you then have the clearly identified federal
15 candidate, you look to the words of the ad to
16 determine whether there's express advocacy.

17 VICE CHAIRMAN MASON: And you --

18 MS. UTRECHT: If it's a candidate's
19 advocacy.

20 VICE CHAIRMAN MASON: And you don't
21 think the timing one, and that's the candidate
22 threshold, or the timing --

23 MS. UTRECHT: No, Commissioner, only
24 to the extent that it identifies who's a
25 federal candidate or not.

1 VICE CHAIRMAN MASON: Commissioner
2 Weintraub?

3 COMMISSIONER WEINTRAUB: Still on the
4 same issue, looking at 100.22(a), we'll put
5 aside (b), it includes the phrase, it has all
6 these vote for support, blah, blah, blah, all
7 of the particular magic word type expressions,
8 and then it says, "or communications of
9 campaign slogans or individual words which in
10 context can have no other reasonable meaning
11 than to urge the election or defeat of one or
12 more clearly identified candidates, in
13 context." So what do you think that means, "in
14 context"?

15 MS. UTRECHT: We think "in context"
16 means the communication itself.

17 COMMISSIONER WEINTRAUB: And --

18 MS. UTRECHT: You can't pull a line,
19 you look at the whole communication, you don't
20 pull out a particular line.

21 COMMISSIONER WEINTRAUB: And going
22 back to that ad that so troubles Commissioner
23 von Spakovsky, that includes, you know, yes,
24 this is a nice story about the Santiago family,
25 but it includes this language, "We need a

1 president who encourages pursuit of the
2 American dream, instead of dashing these hopes.
3 John Kerry, making the American dream a
4 reality."

5 In the context of this ad, what other
6 reasonable meaning can this ad have than to
7 advance -- advocate the election of John Kerry?

8 MS. UTRECHT: Commissioner, if you're
9 talking about what other reasonable meaning,
10 then we're not -- we're beyond, I think, (a).

11 COMMISSIONER WEINTRAUB: No, I'm
12 reading from (a), 100.22(a).

13 MS. UTRECHT: And the context is he
14 has the right plan for the American dream, but
15 it does not include any exhortation to take any
16 action, and that's what we think that the
17 Courts have said, a express advocacy has to
18 happen, it has to have an exhortation, simply
19 describing someone's position and what they
20 would do without an exhortation to take
21 electoral action is not express advocacy.

22 VICE CHAIRMAN MASON: Commissioner
23 Walther?

24 COMMISSIONER WALTHER: Thanks very
25 much for being here in this experiment for all

1 of us. You've done a great job in your brief
2 and in your presentation, and we really
3 appreciate it, and I think it's going to be
4 very helpful for us to have this process in the
5 future. Going back a little bit to that very
6 issue on 22(a), did Media Fund decide 22(a) did
7 not apply?

8 MS. UTRECHT: No, we believe that
9 22(a) is the magic words, express advocacy.
10 That's how we believe it has been interpreted.

11 COMMISSIONER WALTHER: That was really
12 the guide, the lodestone it went by and not
13 22(b)?

14 MS. UTRECHT: We don't believe that
15 22(b) is applicable. We did -- our effort to
16 review what the Commission had done in prior
17 cases, in a sense, was trying to figure out if
18 there were other principles we could learn that
19 may be beyond the words "express advocacy."
20 So, you know, maybe when we try to make our ads
21 like these prior cases, it may be that the
22 Commission in those cases was applying what it
23 thought 100.22(b) required, but, you know, so
24 in that sense, if you were looking beyond the
25 words of express advocacy.

1 COMMISSIONER WALTHER: So you do
2 attempt to look at 22(b) and how it had been
3 applied?

4 MS. UTRECHT: Yes.

5 COMMISSIONER WALTHER: And let's go to
6 22(a) for a second, since we talked about that.
7 But in the reg itself, it says, "Smith for
8 Congress." Now, in that, it doesn't say when,
9 it doesn't say what to do, it doesn't say vote
10 for, it doesn't even say candidate, it doesn't
11 say vote, and it doesn't say election. Now,
12 with that in your mind, that alone, that's
13 express advocacy, is that correct?

14 MS. UTRECHT: We believe it is express
15 advocacy to the extent that it is in the
16 Commission's regulation, and we were clearly
17 trying to follow 100.22(a). I think that one
18 of the reasons why the example of Smith for
19 Congress is given is because it is very common.
20 For example, you see, sometimes see buttons or
21 bumper stickers in ads that clearly are giving
22 an electoral message.

23 So we think Smith for Congress is
24 different than saying, we need a president who,
25 after having talked about somebody's

1 qualifications or their position on the issues.

2 COMMISSIONER WALTHER: Well, then the
3 next one says, "Bill McKay in '94." It doesn't
4 say for what. It could be student body
5 president, if you saw it on a billboard. I
6 mean, I just wonder in what context, if you
7 were looking only at the four corners, we say
8 here that's express advocacy, but it implies
9 that people know already that that individual
10 is a candidate for federal office.

11 MS. UTRECHT: I guess, as I mentioned
12 previously, I think that -- we think that's
13 different because the question is whether you
14 have a person who is a clearly identified
15 federal candidate. If Smith or whatever is not
16 a clearly identified federal candidate because
17 he's running for a nonfederal office, then you
18 don't get to express advocacy because you don't
19 first have a communication that shows or talks
20 about a clearly identified federal candidate.

21 COMMISSIONER WALTHER: In a number of
22 the attachments we have, they certainly talk
23 about Bush, Kerry, in essentially strong terms.
24 Is there any doubt in your mind that the
25 message of their candidates is being conveyed

1 there, even though it doesn't say, "For
2 President"?

3 MS. UTRECHT: I think it's more a
4 question of the fact is that they were clearly
5 identified federal candidates, so then you go
6 to the next step because the law covers them,
7 and then you look at the communication to
8 determine whether it contains express advocacy.
9 And, again, we think that the case law provides
10 that you have to have a directive or
11 exhortation to take electoral action in order
12 for there to be express advocacy.

13 COMMISSIONER WALTHER: Does that mean
14 to vote, or what electoral action would you
15 say?

16 MS. UTRECHT: To vote, yes, vote,
17 support, there are some cases where courts have
18 found that there was express advocacy, the
19 exhortation was to campaign for and contribute
20 to those cases that have not gone up to the
21 Supreme Court, so we don't know, but the
22 exhortation in, as the Court cases have
23 described, it has to be related to taking
24 electoral action.

25 COMMISSIONER WALTHER: Well, in one of

1 these ads, for example, the one in -- and I
2 don't know how to identify it to you, but in
3 the jargon of conveying people's, a message to
4 people, do you agree with the Supreme Court
5 when it said that, as I roughly would phrase
6 it, that sophisticated people who want to
7 convey a message to go vote don't say, "go
8 vote," they do it quite more effectively in
9 other ways, and are we to disregard that up
10 until now?

11 MS. UTRECHT: No, Commissioner, I
12 think that precisely that was the problem that
13 led the McConnell court to conclude that you,
14 for express advocacy, which is a vague and
15 intentionally overbroad provision, that you
16 have to look to whether the magic -- Buckley
17 said you have to look to see whether there are
18 magic words.

19 McConnell then went on to say, okay,
20 but we recognize that this idea of express
21 advocacy doesn't always work, so we are going
22 to allow Congress to, in the context of a very
23 specific, definite, unambiguous statute say
24 that if you have electioneering communications,
25 you will have to report them, and you will have

1 to not use corporate labor money, and then you
2 don't -- no one has to look at what the
3 communication says, it simply depicts a federal
4 candidate, it's during that time period, so
5 these rules apply.

6 That is not vague or overbroad as the
7 Court found in McConnell, but that -- the Court
8 did specifically say that if you have a statute
9 that is vague or overbroad, you would still
10 have to then look at the magic words in order
11 to determine whether it could be regulated or
12 not.

13 COMMISSIONER WALTHER: Well, if you
14 look at the stand-up African American TV thing
15 that goes on about Kerry, off and on, off and
16 on, off and on, the message here that says John
17 Kerry understands the war and who is
18 disproportionately affected by it, the way this
19 war is going, our 14-year-olds will be fighting
20 in Iraq for four years, you better wake up
21 before they get taken out, do you see any
22 action being requested there in that message?

23 MS. UTRECHT: The action, no, there is
24 not action being requested, but that's a
25 colloquialism that means don't let them pull

1 the wool over your eyes, don't be fooled again.
2 I mean, this has a very powerful anti-war
3 message, and the message here is the Republican
4 administration is disproportionately sending
5 your children to Iraq, and you better wake up
6 and realize that that's what's happening, it
7 doesn't urge them to go vote or take any
8 specific action.

9 And in fact, it is, I think, a pretty
10 powerful message that the war is adversely
11 affecting minorities.

12 COMMISSIONER WALTHER: But when you
13 couple it with repeated statements about John
14 Kerry, who I gather from your questioning you
15 would concede would be known to anybody hearing
16 this, was a candidate for president with
17 another statement about what he believes and
18 what he stands for, and then you say, you
19 better wake up before you get taken out, is it
20 unfair to conclude that that's a message to
21 urge his election?

22 MS. UTRECHT: I believe it is,
23 Commissioner, and I think in this particular
24 ad, the general counsel is asserting it's where
25 100.22(b) applies, and under that regulation,

1 even if it were valid, it requires that the
2 message be unambiguous and unmistakable, and I
3 think it's, at the very least, clear that this
4 message is ambiguous and is not unmistakable.

5 COMMISSIONER WALTHER: So you would
6 concede your position would be it falls out of
7 22(b) in any event?

8 MS. UTRECHT: Yes.

9 COMMISSIONER WALTHER: Well, thank you
10 very much.

11 VICE CHAIRMAN MASON: The general
12 counsel, I know, has some questions, has been
13 holding back, but I want to give her an
14 opportunity. Thank you, general counsel,
15 Thomasenia Duncan.

16 MS. DUNCAN: Thank you, Mr. Vice
17 chairman. Good morning. I wanted to pursue a
18 few questions along the same lines that some
19 Commissioners have pursued on the question of
20 express advocacy, and drawing your attention in
21 particular, again, to the education mailer, as
22 you referred to it in your response to the
23 brief, I understand your position is that that
24 does not reflect express advocacy because
25 there's no exhortation or no actual call to the

1 reader to do anything.

2 But I want to ask specifically about
3 the phrase or the sentence, "We need a
4 president who encourages pursuit of the
5 American dream, instead of dashing these
6 hopes." How do you respond to the argument
7 that in fact that is an exhortation because a
8 person reading that or seeing that, the only
9 way to fulfill that need or that goal of
10 needing a president is in fact to vote, what is
11 your view on that?

12 MS. UTRECHT: I think in the context
13 of the ad, I mean, the saying that you have a
14 need is not an exhortation to go do anything,
15 and the reference to president is
16 indistinguishable in our view from other
17 compliance actions where the Commission found
18 there was not express advocacy, including MURs
19 4483 and 5158, plus there is an alternative.
20 You could, looking at this ad, conclude that
21 you need to change the policies of the
22 administration.

23 MS. DUNCAN: Let me ask you a similar
24 question with respect to the mailer that we
25 call the healthcare mailer, or that you call

1 the healthcare mailer, which is addressed on
2 page 11, and the Sierra Club mailer, which is
3 contrasted with that, which is recently deemed
4 express advocacy. Both seem to contrast the
5 presidential tickets, favoring one ticket over
6 the other.

7 And I believe your response argues
8 that the major distinction between the two
9 mailers is the tag line, the Sierra Club
10 mailer's tag line is, "Let Your Vote Be Your
11 Choice." The other mailer's tag line is, "The
12 Choice is Clear." And I'm wondering if you can
13 address the question of why choosing can't be
14 equated with voting in that context.

15 MS. UTRECHT: Because the ad itself,
16 the mailer itself talks about plans for
17 healthcare, and the choice is not to vote, the
18 choice is what plan is best for the American
19 people. "Vote" is also an exhortation to take
20 action, while "the choice is clear" is not an
21 exhortation to take any particular action.

22 We view -- the Sierra Club mailer
23 actually said, "vote," and there is another
24 Sierra Club mailer that was in MUR 5154 that
25 compared the Kerry and Bush environmental

1 records and found no express advocacy, we think
2 this ad is much more comparable to that ad than
3 to the one in the most recent Sierra Club MUR.

4 MS. DUNCAN: If I might just switch
5 subjects for a moment and talk a bit about
6 major purpose? I understand that your view is
7 that the general counsel's office application
8 of that test is -- it's misapplied and that
9 it's misplaced in this context. And I think I
10 understand from your answer, your first answer
11 to -- or your answer to the vice chairman's
12 first question that if that test were applied,
13 you would have an alternative way of applying
14 it here, and I understand that.

15 Assuming that the Commission does find
16 that the Media Fund either accepted \$1,000 in
17 contributions or made \$1,000 in expenditures,
18 do you dispute under either one of those tests
19 for major purpose that the Media Fund's major
20 purpose was to defeat George Bush and elect
21 John Kerry?

22 MS. UTRECHT: Yes, we believe that the
23 Media Fund's major purpose was to make
24 communications that would not be expenditures
25 under the law and, in some instances, would be

1 electioneering communications subject to those
2 provisions, and we think you need to look at
3 that, none of the cases that deal with major
4 purpose were decided after the, this whole
5 statutory construct of the 520, combined with
6 the 527 legislation requiring reporting to the
7 IRS by 527s, and then the acknowledgment in
8 BCRA that there was this category of speech
9 that was electioneering communications that
10 were not expenditures under the law.

11 And we believe you have to look at the
12 major purpose test in that, the context of
13 those legislative developments, and we think
14 there's support for that both in the GOPAC case
15 and in the MCFL, I'm sorry.

16 MS. DUNCAN: I understand. We
17 understand also that your view is that the
18 general counsel's reliance on the Survival
19 Education Fund case is flawed, but you know
20 that the Commission has already applied that
21 case to solicitations by other 527
22 organizations. What distinguishes the Media
23 Fund solicitations from the solicitations that
24 the Commission has already concluded result in
25 contributions under the Act applying that case?

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1 MS. UTRECHT: You know, if you want us
2 to address that, we can do that after the
3 hearing, in writing, but we think you wrongly
4 applied Survival Education Fund in those cases,
5 so without going back and looking at their
6 solicitations and comparing them, which I
7 haven't done, I don't know if there is also a
8 distinction between their solicitations and the
9 Media Fund solicitations, but as we said, you
10 know, we don't believe that Survival Education
11 Fund establishes the principle that it's being
12 used for here.

13 MS. DUNCAN: Just one further question
14 at this time, does the Media Fund have plans to
15 be active in future election cycles?

16 MS. UTRECHT: I don't know at this
17 particular time. I mean, I would note that the
18 Media Fund did operate in 2005 in Virginia, and
19 there was some activity during 2006.

20 MS. DUNCAN: Thank you.

21 VICE CHAIRMAN MASON: Commissioner von
22 Spakovsky?

23 COMMISSIONER von SPAKOVSKY: The major
24 purpose test has been around for 30 years, the
25 major case on this established by Buckley.

1 And, Ms. Utrecht, what I don't understand is
2 you made a great deal of saying this
3 organization is very concerned about issues.
4 If that's the case, and I refer you to this
5 document called the Media Fund victory campaign
6 2004, a strategic plan for winning, in which
7 Mr. Ickes, in his deposition, indicated was
8 used in raising funds.

9 There's almost no discussion of issues
10 in this. This was a document you all used to
11 get this organization going, to raise money,
12 tell everyone that you were raising money
13 from -- or you were going to do. There's no
14 discussion of issues here. Without the
15 aggregated resources of the Media Fund, the
16 Democrats simply will not be competitive in
17 this predimension period. That's direct from
18 it.

19 Another provision, talking about the
20 Democratic nominee, he will have insufficient
21 funds to keep him visible and competitive.
22 Another thing from him, Democrats act at our
23 peril who wait until late July to begin
24 sufficient media and thereby permit the
25 Republicans to define the race and effectively

1 win the election by late August. I don't think
2 we're talking about winning the school board
3 election. We're talking about winning the
4 presidential election.

5 Another part from the presentation,
6 "Thus 17 states will decide who takes the oath
7 of office for president in January 2005." This
8 is not like what we see when we have done MURs
9 against certain organizations, certain advocacy
10 organizations. They're clearly issued,
11 oriented, they're concerned with things like
12 abortion and conservation.

13 I mean, the entire discussion here is
14 to act as a substitute for the Democratic
15 presidential campaign by raising soft money and
16 filling in the gap that the campaign itself
17 can't do. How in the world does this not meet
18 the major purpose test laid out by the Supreme
19 Court?

20 I mean, I've been a lawyer for a long
21 time, and I've sometimes taken positions in
22 court that I didn't always think were quite as
23 solid as they should be, but I would have a
24 pretty tough time getting up and making that
25 claim before the Supreme Court had laid out the

1 major purpose test and not be afraid that I
2 would get whip-sawed by the Justices when I'm
3 standing before them. Given this document, how
4 could they not meet the major purpose test?

5 MS. UTRECHT: Commissioner, I think we
6 have a couple of responses to that. First of
7 all, that was a presentation that was used in a
8 joint fundraising effort, and there was a
9 participant in the joint fundraising effort
10 that was a federal political committee. And
11 under the joint fundraising laws at the time,
12 there was no restriction on what an
13 organization would say in a joint fundraising
14 solicitation as to -- that that would affect in
15 any way whether the funds that were raised were
16 hard money or soft money funds.

17 We also think that it's, in order to
18 look at what an organization's major purpose
19 is, you actually have to look at how they spend
20 their money. You can have an organization that
21 has a purpose in order to influence an
22 election, but in fact, doesn't even make any
23 expenditures that mention a federal candidate.

24 That is something that could happen
25 and has happened. And you don't look to the

1 major purpose based solely on what someone is
2 saying or how they're raising the money. You
3 have to look at how that money is spent.

4 COMMISSIONER von SPAKOVSKY: Well,
5 taking that answer, but going back to what our
6 general counsel, Ms. Duncan, asked you about,
7 in none of the ads that she asked you about, if
8 it was the issues in the ads that were so
9 important to this organization, such as the
10 healthcare plan, college tuition plan, if that
11 was -- the issue was what was important, as
12 opposed to the presidential race, why was there
13 nothing in any of the ads that asked the
14 listener or the viewer to call the Senate, to
15 call Senator Kerry, to ask them to sponsor such
16 legislation, or to support such legislation?

17 Senator Kerry, in the position he had
18 at the time, in order to be able to do anything
19 about any of these issues, he was a sitting
20 Senator. If he wanted to do something about
21 it, he could by sponsoring legislation on these
22 issues. And, you know, your ads then could
23 have asked people to support him in doing that,
24 but they didn't do that.

25 They were all geared towards, from

1 what I've seen him being able to do, something
2 about those issues if he was president.

3 MS. UTRECHT: Commissioner, I'm not
4 quite sure what that question is going to. If
5 it's going to whether those ads were express
6 advocacy, we don't think the law required any
7 exhortation, to take any other action. We
8 simply believed it required no exhortation to
9 take electoral action.

10 If it's going to the major purpose of
11 the organization, then it's our view that if
12 you look at the major purpose test and you look
13 at what GOPAC court said and the MCFL court
14 said, you look to the express advocacy
15 communications, if there were any, to determine
16 what the purpose of the organization was, not
17 the other communications.

18 COMMISSIONER von SPAKOVSKY: I guess
19 my question was, and I apologize for not making
20 this clearer, is if the issue was what was
21 important, why was there not discussion in the
22 ad of what Senator Kerry could actually do
23 about it, given his position? Why was there
24 discussion of the other presidential candidate
25 and getting someone in as president who would

1 do something about that issue?

2 MS. UTRECHT: Because these were
3 electioneering communications, they were not
4 express advocacy expenditures, and it, in our
5 view, is clear that Congress, the Courts, and
6 this Commission contemplate that a 527
7 organization in the '04 election cycle could
8 establish a 527 that would make electioneering
9 communications, and that that was a legitimate
10 purpose and did not make you a political
11 committee.

12 VICE CHAIRMAN MASON: I just want to
13 get clear, you're not contending that
14 electioneering communication express advocacy,
15 absent some coordination or exclusive, in other
16 words, we have an exemption in the
17 electioneering communication rules that says,
18 of course, if it's express advocacy, then it
19 doesn't qualify as an electioneering
20 communication.

21 MS. UTRECHT: That is correct.

22 VICE CHAIRMAN MASON: So I take it
23 your position is not that, simply because it's
24 on TV and mentions a candidate within the
25 relevant timeframe, that excludes it as express

1 advocacy, and so I'm not sure what saying that,
2 "It's an electioneering communication," does to
3 answer the questions whether or not it was
4 express advocacy.

5 MS. UTRECHT: I'm sorry, then I didn't
6 understand his question as to whether that made
7 it express advocacy. I thought he was getting
8 to, at this point, to the purpose of running
9 the ads, being related to issues, as opposed to
10 related to the election. I think you can
11 certainly have an electioneering communication
12 if it's made by an organization that is not
13 already a political committee, that would be an
14 express advocacy.

15 It's our contention that none of Media
16 Fund's communications were express advocacy.
17 Some of them were electioneering communications
18 because they fell during the electioneering
19 communication time periods.

20 VICE CHAIRMAN MASON: But you said,
21 several times during your presentation, that in
22 some fashion or other, the 527 legislation and
23 express advocacy category shapes the way we
24 ought to approach express advocacy, or at least
25 that was my interpretation of what you said.

1 And I don't understand that, and I would note
2 that the Commission heretofore has resisted, in
3 a number of fora, the urgings of a lot of
4 people to somehow equate 527 status with
5 political committee status.

6 We've said we're not going to do that,
7 so on and so on, so that's not what we're
8 reaching for. But in what way does the 527
9 legislation or the electioneering communication
10 ban inform our determination of what is or is
11 not express advocacy?

12 MS. UTRECHT: I don't think it does,
13 Commissioner, I didn't mean to imply that. My
14 point is that if you find an express advocacy
15 expenditure, that then when you look at the
16 purpose of the organization, you look at the
17 ratio between the express advocacy, if any, and
18 the electioneering communications, which, in
19 our view, is clear, do not trigger political
20 committee status.

21 COMMISSIONER von SPAKOVSKY: If issues
22 were the important thing, why were these only
23 run in the 17 battleground states important to
24 the election of the presidency, as opposed to
25 the states' key individuals in the Senate and

1 the House who chair committees and could
2 actually make a difference on these issues?

3 MS. UTRECHT: I think there is a lot
4 of evidence in the record that reflects that
5 the ads were run in areas where the public,
6 because of the timing and where the attention
7 was, the public was paying attention to what
8 the issues were, and the Media Fund made an
9 effort to raise the issues that it thought the
10 public ought to be looking at and considering
11 during this period of time, and it was on that
12 basis that the markets were selected.

13 There were also a lot of other
14 considerations, which is in the record, as to
15 where these ads were run, including the
16 relative costs of some of the media markets.
17 So the ads were not run in media markets where
18 there would be a significantly greater cost.

19 VICE CHAIRMAN MASON: Are there
20 further questions? Commissioner Walther?

21 COMMISSIONER WALTHER: I have one
22 question. Under 22(a), when you used the
23 phrase, or in context, it's your opinion, it's
24 only in the four corners of the instrument, do
25 you rely on any particular guidance for that

1 opinion?

2 MS. UTRECHT: I think that's what the
3 Supreme Court said in Buckley, and then I think
4 the most recent case is the Wisconsin right to
5 life case, where the Court said, look only at
6 the four corners of the ad, I understand that's
7 on appeal, but we think that accurately
8 reflects the law.

9 COMMISSIONER WALTHER: Is that
10 consistent with the proposition though that,
11 earlier in that sentence they refer to the name
12 exactly, the Smith for Congress and X in 2004,
13 there has to be some context outside that
14 document that you would convey doesn't indicate
15 anybody?

16 MS. UTRECHT: But Smith for Congress
17 identifies the office that the person is
18 running for that is express advocacy.

19 COMMISSIONER WALTHER: Just that
20 alone?

21 MS. UTRECHT: Uh-huh.

22 COMMISSIONER WALTHER: And that urges
23 action?

24 MS. UTRECHT: Again, I think you're
25 talking about words, if you find words of

1 express advocacy, the magic words, then we
2 don't think you look at anything beyond that.
3 Where we're talking about looking at vote,
4 election, those other words, it's where, in our
5 view, there are not the magic words, words of
6 express advocacy.

7 And then we were endeavoring to figure
8 out if there was not, if there were not the
9 magic words, how would you then determine, by
10 looking at an ad, whether it was express
11 advocacy based on what the Commission had done
12 in the past, but not -- we don't agree that
13 anything beyond the magic words is express
14 advocacy or should be express advocacy.

15 COMMISSIONER WALTHER: Did you assume
16 that 22(b) was on the books, but essentially,
17 in the minds of the FEC, off the books at that
18 point? Because it does seem to me like
19 there's -- you're hovering around that fairly
20 clearly, and why would then an advisory opinion
21 be helpful to you to find out exactly where we
22 were?

23 MS. UTRECHT: Yeah, the problem with
24 an advisory opinion, particularly in the
25 context of ads, each one of these mailers and

1 each one of these ads went through innumerable
2 iterations, and any word that you change might
3 change how we would look at the ad, as lawyers
4 reviewing the ad, and might change how the
5 Commission would look at it.

6 So the advisory opinion process, while
7 it's very helpful for certain kinds of
8 questions, it's not particularly helpful for
9 the ads because, in order to get an advisory
10 opinion, the Commission would certainly have
11 asked us, as they have in the past, when people
12 requested them for the specific language that
13 you want to use, and I mean, I can't tell you
14 how many different versions of various ads we
15 look at during an election cycle.

16 I mean, you probably know that, but
17 it's just not something that lends itself to
18 the advisory opinion process.

19 COMMISSIONER WALTHER: Thank you.

20 VICE CHAIRMAN MASON: I wanted to
21 clarify, Commissioner von Spakovsky was asking
22 about the fundraising presentation, which is
23 referred to in the general counsel's brief,
24 again at page seven. Counsel's brief says,
25 "TMF's president, Harold Ickes, made oral

1 presentations to various individuals and groups
2 in an effort to raise money for TMF,
3 specifically to counter the Bush onslaught," so
4 on, refers to his deposition and then to some
5 PowerPoint slides. And if I understood your
6 response to Commissioner von Spakovsky, you're
7 saying that those presentations were all in the
8 context of joint fundraising appeals?

9 MS. UTRECHT: They were not all in
10 that context. Many were, there are not records
11 that reflect completely how many of them were
12 during the joint fundraising, but most of it
13 was. But I think, more importantly, from our
14 standpoint, you know, the law that was
15 applicable at that time, we don't think said
16 that if you mention a federal election, that
17 the money that you raise is hard money.

18 So we don't, we wouldn't -- if that
19 presentation was used for a meeting that was
20 not involved in joint fundraising, we believe
21 that that would have been permissible
22 communication to have had with potential
23 donors.

24 VICE CHAIRMAN MASON: Do you
25 understand the general counsel's position to be

1 that the test is mentioning federal election?

2 MS. UTRECHT: Well, we understand, I
3 think there are two different issues here. I
4 think the general counsel's arguing that
5 because the solicitation said that money would
6 be used in connection with the federal
7 election, that all the money that was raised
8 should have been hard money.

9 And then I believe also that the
10 general counsel's office is saying that if you,
11 that that goes to major purpose as well, and in
12 our view, you can't make that leap because you
13 have to look at how the Media Fund spent its
14 money in order to determine what its purpose
15 was.

16 VICE CHAIRMAN MASON: I think that's
17 part of the analysis, but I just want to point
18 out that in the presentations, Bush can be
19 beaten, the race for 270, the fight for the
20 White House, the fight for the White House,
21 it's a state-by-state battle, time to counter
22 Bush onslaught, will challenge Bush, strategic
23 assumptions, March to July, media is key to
24 Republican strategy, I just want to point out
25 and not leave you under any misimpression that

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1 the general counsel's office is representing
2 that a solicitation that merely mentions a
3 federal candidate or mentions a federal race
4 constitutes a solicitation.

5 It's, rather, solicitation for funds
6 because Bush can be beaten, is what puts it
7 over the line, I understand there may still be
8 a dispute, but I just don't want to leave
9 unsaid that somehow a mention of race or
10 mention of candidate test is what's being
11 proposed.

12 MS. UTRECHT: No, I understand that.
13 The important point is there's no authority for
14 the fact that how you solicit the money
15 determines what kind of money you raise. I
16 mean, before BCRA, when there was joint
17 fundraising between the federal and nonfederal
18 accounts of party committees, it was a common
19 practice, and in fact, there is a lot of
20 information in the depositions in the McConnell
21 litigation that shows that it was clearly a
22 practice that members of Congress were
23 soliciting soft money and party leaders were
24 soliciting soft money, making representations
25 that that money would be used in part to

1 influence a federal election and support the
2 election of those candidates.

3 And the Commission never once, during
4 that entire period of time, said that what you
5 said when you raised the soft money for the
6 party committees determined what kind of money
7 it was that you raised.

8 VICE CHAIRMAN MASON: Any further
9 questions. Commissioner Weintraub?

10 COMMISSIONER WEINTRAUB: Suppose it
11 came down to one ad, I mean, I hear you when
12 you talk about, you know, reviewing the ads on
13 a minute-by-minute basis for the campaign.
14 Suppose, put aside the solicitations and let's
15 focus on just the expenditures, and suppose, on
16 every single communication, I agreed that you
17 got it right, except one, okay? But on that
18 one, let's say I think we need a president who
19 encourages pursuit of the American dream,
20 followed by John Kerry will make college
21 education affordable for every American, John
22 Kerry making the American dream a reality.

23 Suppose I look at that and say, when I
24 look at 122(a) and I look at that in context, I
25 can't come up with another reasonable meaning

1 for this, other than vote for John Kerry for
2 president. Do I have a choice, is there some
3 other way that -- is there some other
4 conclusion that I can draw from finding that
5 express -- once I determine there's express
6 advocacy in an ad that costs more than \$1,000,
7 is there anywhere else I can go, other than to
8 say you tripped over the political committee
9 threshold, and now, you're just stuck?

10 MS. UTRECHT: Yes, Commissioner I
11 think you can find that the major purpose of
12 the Media Fund was not to make expenditures
13 under the Act, and therefore, it is not a
14 political committee. I mean, that in fact is
15 what happened.

16 There are several cases that, I can't
17 remember them all, but I know there are a
18 number of cases, including cases involving the
19 California Democratic party, where the
20 Commission in the past has found that a
21 particular expenditure that was allocated
22 between the federal and nonfederal accounts was
23 improperly made by a nonfederal account.

24 And the Commission fined them for
25 improperly using soft money to make that

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1 particular communication, but they didn't fine
2 the nonfederal account of the party to be a
3 federal political committee, so I think, based
4 on that and MCFE and GOPAC, in terms of what
5 you would look at to determine the
6 organization's major purpose, I don't think if
7 you find one communication that, in your view,
8 is express advocacy, that it is a foregone
9 conclusion or the correct analysis that all of
10 the money that the Media Fund spent was money
11 that should have been spent by a federal
12 committee.

13 COMMISSIONER WEINTRAUB: If the major
14 purpose test means that your major purpose was
15 making -- more than 51 percent of your
16 disbursements went for express advocacy
17 communications, why do you need -- I mean, it's
18 no longer a two-part step. It sort of
19 collapses the analysis. If it's express
20 advocacy as the expenditure trigger and express
21 advocacy as the major purpose definition,
22 then -- I'm having trouble enunciating this,
23 but I wonder if you can intuit where I'm going
24 with this.

25 I'm trying to figure out whether

1 there's a two-stage analysis, in your view, or
2 really just a one-stage analysis, and that is,
3 you can just almost skip over whether there was
4 the first thousand dollars, the real question
5 is, was 51 percent of your money spent on
6 express advocacy? Because if that's true, then
7 by definition, the thousand dollars would have
8 been spent on express advocacy. Do you see
9 where I'm going?

10 MS. UTRECHT: Not entirely.

11 COMMISSIONER WEINTRAUB: I'm not
12 making myself clear.

13 MS. UTRECHT: I think that the Court
14 in MCFL dealt with that to the extent that it
15 said, okay, fine, if you are an MCFL
16 organization, you can make independent
17 expenditures, but if you get to the point where
18 your independent expenditures are 51 percent of
19 what you're doing, then you are a political
20 committee, even though we've said that you can
21 make the independent expenditures.

22 So if your question is, is it two
23 parts of the same argument where you're looking
24 at how the money is spent, I guess the answer
25 is, I think, yes, because when you get to the

1 major purpose test, you still have to look at
2 what was done by the organization, not just
3 what it said it was doing. And I think, in the
4 political committee rule-making, I think we had
5 a lot of discussion about what -- whether the
6 major purpose test is intent or purpose. And I
7 recognize that there are some difficult
8 concepts there.

9 I also think that, in going back to
10 your question, your original question about
11 this, where do you go, I think that to the
12 extent that it is unclear where the definition
13 of express advocacy begins and ends, that where
14 you have an organization that has made numerous
15 communications, only six of which the general
16 counsel's office has pulled out, if you end up
17 concluding that there is one that is,
18 recognizing that it is ambiguous, and people
19 could disagree over whether that is express
20 advocacy or not, that there is also a
21 fundamental unfairness in making an entire
22 organization a political committee because
23 there's a disagreement over the content of one
24 ad.

25 COMMISSIONER WALTHER: I'll try it one

1 more time, although I don't know if this will
2 make it any clearer for you. It seems to me
3 that the way you described it, the major
4 purpose test basically supercedes the \$1,000
5 expenditure threshold because it doesn't matter
6 if you make -- you can make \$1,000 in
7 expenditures, but the real question is, have
8 you made 51 percent of your disbursements in
9 expenditures?

10 It's sort of -- the first part of it
11 becomes a really insignificant piece, rather
12 than an important threshold question.

13 MS. UTRECHT: But, no, I don't agree
14 with that, but I think that is the way Buckley
15 set up the major purpose test. It says you
16 first look to see whether there was a
17 contribution or an expenditure over \$1,000, and
18 then once you get to that point, you have to
19 look at the major purpose of the organization.

20 And the cases that follow Buckley, the
21 Court looked at all of the spending that the
22 organization made in order to determine whether
23 its major purpose was to make these election
24 related expenditures. So I think -- I don't
25 think it eliminates the express -- I mean the

1 contribution and expenditure analysis.

2 It's just that once you've done that,
3 you still have another step that you have to go
4 to.

5 VICE CHAIRMAN MASON: I want to
6 understand, if you think the contribution side
7 of that has any independent need or you
8 indicated, at least in some of the history, the
9 Courts has looked at, well, what was the money
10 used for, and so is there any circumstance in
11 which one can determine a contribution had been
12 made to an organization that doesn't concede
13 political committee status without determining
14 what the money was used for?

15 MS. UTRECHT: Well, as we said in our
16 brief, our view of Buckley is that it's clear
17 that a contribution becomes a contribution when
18 the organization that receives it either makes
19 contributions to candidates or makes express
20 advocacy expenditures, so -- and, yeah, you
21 would look at the same thing, once you get, if
22 you have a contribution that is converted into
23 a contribution to a candidate or an express
24 advocacy expenditure, then you would find that
25 there were contributions that were accepted.

1 We don't think that the general
2 counsel's reliance on Survival Education Fund
3 is a valid way of determining what was a
4 contribution fund.

5 VICE CHAIRMAN MASON: Leaving aside
6 survival and just to sharpen it up, if a person
7 soliciting on behalf of an organization says,
8 please give me some money to defeat George
9 Bush, and the donor replies with a written
10 letter accompanying the solicitation saying,
11 this money is to defeat George Bush, your
12 position is that that solicitation and receipt
13 does not constitute a contribution unless and
14 until that money is spent on express advocacy
15 or on a contribution to a political committee?

16 MS. UTRECHT: No, I mean, before this
17 Commission's 100.57, I don't believe that was
18 the law. I mean, now, there's a regulation
19 that says that, although I do think that that
20 regulation is one that would be subject to
21 dispute and could possibly be challenged.

22 VICE CHAIRMAN MASON: So under the
23 statute, what's the independent meaning of
24 contribution applying to the political
25 committee definition?

1 MS. UTRECHT: In order to be a
2 contribution, it has to be converted into a
3 contribution directly to a candidate, other
4 political committee, or used to make an express
5 advocacy expenditure, and I think Buckley said
6 that many years ago.

7 VICE CHAIRMAN MASON: But the
8 contribution is the threshold test, so we can't
9 posit it has to be a political committee fee
10 contribution because what determines whether
11 you're a political committee is whether you
12 receive contributions, so I'm trying to
13 determine what independent meaning the
14 contribution definition in the Federal Election
15 Campaign Act has if it is entirely restricted
16 to the ultimate use of the funds.

17 MS. UTRECHT: Commissioner, I think
18 that's what Buckley said. We analyze that in
19 our brief, and I think it's clear that if you
20 have an intent, a donor has an intent to give
21 an organization money and the organization
22 doesn't use it for the purpose of making the
23 contribution or making an express advocacy
24 expenditure, the individual may very well have
25 a grounds for asking for its money back because

1 it wasn't spent the way they wanted it to be
2 spent.

3 But if you don't, if the organization
4 doesn't use that money to make contributions or
5 expenditures, then I don't think that's how
6 that could be a contribution that would be
7 subject to the limits.

8 VICE CHAIRMAN MASON: Mr. Walther?

9 COMMISSIONER WALTHER: Just to follow
10 up on that a little bit, assuming -- on page
11 eight of the brief, these were made, and
12 significant money was raised from those
13 representations, and I'll call them
14 representations because you solicit money in
15 saying, "The 17 key states will decide the 2'04
16 election," and then you spend it on the 17
17 states, it says, "The Media Fund's strategic
18 assumptions," which means to me, generally,
19 this is our overall goal, here's where we're
20 headed, key to the Republican strategy, Clinton
21 campaign spent millions, we must counter this
22 to win.

23 If all of this money is taken in,
24 suppose all this money is taken in, I have two
25 questions. One is if it never gets spent, it's

1 not a political committee?

2 MS. UTRECHT: I believe that's
3 correct.

4 COMMISSIONER WALTHER: And secondly,
5 so, really, the word "contribution" can be
6 written out of the statute from that
7 perspective, it's not a contribution until it's
8 spent?

9 MS. UTRECHT: Or given to an
10 organization that is a political committee.

11 COMMISSIONER WALTHER: Okay. And
12 then, secondly, then if you take that kind of
13 money, are you saying that -- I'm sure you must
14 concede that much money was raised from these
15 kind of representations, was it not spent for
16 those purposes?

17 MS. UTRECHT: It was spent on
18 electioneering communications and, in fact, on
19 some communications that didn't even qualify as
20 electioneering communications, but that, I
21 think your question is really going to the
22 interplay between intent of a contributor and
23 purpose of an organization. There are
24 organizations that can say that their intent is
25 to influence the election of a candidate, but

1 never -- they run ads that never even mention
2 the name of the candidate.

3 And under those circumstances, the
4 fact that the contributor intended that the
5 election be influenced, the communications are
6 not something that's subject to the Federal
7 Election Campaign Act because there's never
8 even a mention of a clearly identified
9 candidate in an ad that has run, so I do
10 think -- you can't look at definition of
11 contribution in a vacuum because if the money
12 isn't spent the way Buckley interpreted for the
13 purpose of influencing to be, to make
14 contributions to candidates or committees or to
15 make expenditures, you do have to go to that
16 next step.

17 COMMISSIONER WALTHER: Do I understand
18 it also that your position is that, in order to
19 have major, major purpose, that money must be
20 only for express advocacy and not bear any
21 other election influencing purpose?

22 MS. UTRECHT: That's correct, other
23 than making contributions, if you made
24 contributions directly to candidates, that
25 would also count.

1 VICE CHAIRMAN MASON: Commissioner
2 Weintraub, seeking recognition. I would note
3 her questioning time is at end.

4 COMMISSIONER WEINTRAUB: Very good.

5 VICE CHAIRMAN MASON: And after this,
6 it would be time for your closing statement.

7 COMMISSIONER WEINTRAUB: I think you
8 make an interesting point about intent -- I'm
9 sorry.

10 MS. UTRECHT: I'm sorry.

11 COMMISSIONER WEINTRAUB: That's okay.
12 I think you make an interesting point about
13 intent, and I just want to see whether I'm
14 getting it right. So, for example, a
15 contributor might think that -- or a donor,
16 someone who gives money, an individual with a
17 checkbook might decide that by sending money to
18 an organization that is distributing Al Gore's
19 movie "An Inconvenient Truth," that that will
20 promote environmental awareness, which will
21 ultimately benefit Democratic candidates
22 because more people will be concerned about
23 issues that Democrats vote more consistently
24 for.

25 The fact that that might be the intent

1 behind the person who buys stock in a
2 corporation that's distributing that movie or
3 makes a -- writes a check out to help fund that
4 endeavor to distribute that movie, that intent
5 of the donor does not convert the check into a
6 contribution, am I hearing that right?

7 MS. UTRECHT: Yes, that's correct,
8 Commissioner.

9 VICE CHAIRMAN MASON: You have five
10 minutes for a closing statement.

11 MS. UTRECHT: I think we've covered,
12 during this period of time, the issues that we
13 had wanted to discuss with the Commission, and
14 we really appreciate the opportunity to be here
15 today and to discuss this with you. I do think
16 that this pilot program is one that may very
17 well result in something that the Commission
18 may find helpful as it goes forward.

19 You know, these are difficult issues,
20 and I think the Commission has recognized over
21 the years that it's very difficult for the
22 Commission to give clear guidance all the time
23 in advance so that the regulated community
24 understands the rules that it will be operating
25 under at the time that it makes its decisions

1 on what to do.

2 And we urge the Commission to go back
3 and look at what the available guidance was in
4 '03 and '04 and evaluate this case and our
5 issues and concerns in light of that precedent.
6 Thank you again for the opportunity to be here.

7 VICE CHAIRMAN MASON: Thank you,
8 Ms. Utrecht. Madame General Counsel, do we
9 need a Sunshine Act closure? Just in case, I
10 will ask, are there any matters discussed which
11 are no longer entitled to exemption under the
12 Sunshine Act?

13 MS. DUNCAN: Mr. Vice chairman, there
14 are none.

15 VICE CHAIRMAN MASON: This meeting is
16 adjourned.

17 (Whereupon, at 11:33 a.m., this
18 executive session of the Federal Election
19 Commission was concluded.)
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REPORTER'S CERTIFICATE

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DOCKET NO.: MUR 5440
CASE TITLE: The Media Fund
HEARING DATE: March 21, 2007
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Court of Federal Claims.

Date: March 21, 2007



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